

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

GERALD D. DONNELL,

Plaintiff,

vs.

CITY OF CEDAR RAPIDS, IOWA and
PAT ENGEL,

Defendants.

No. 05-CV-49

FINAL JURY INSTRUCTIONS

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

In considering these instructions, the order in which they are given is not important.

INSTRUCTION NO. 1

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what I think of the evidence or what I think your verdicts should be.

INSTRUCTION NO. 2

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 3

This case should be considered by you as an action between persons of equal standing and equal worth in the community. All parties have equal rights in court and are to be dealt with as equals in a court of justice. Therefore, the City of Cedar Rapids is entitled to the same fairness and consideration at your hands as a private individual.

INSTRUCTION NO. 4

Certain testimony has been read into evidence from depositions. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider the testimony as if it had been given in court.

INSTRUCTION NO. 5

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 6

In these instructions you are told that your verdicts depend on whether you find certain facts have been proven. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved. The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term “proof beyond a reasonable doubt.” That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 7

You have heard evidence claiming certain witnesses made statements before this trial which were inconsistent with what the witness said in this trial. A witness may be discredited or impeached by evidence that the witness said something, or failed to say something, at some other time which is inconsistent with the witness' present testimony. You are to decide if an earlier statement of a witness was made and whether it was inconsistent with testimony given. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given, but you are not required to do so. However, you should not disregard the testimony if other believable evidence supports it, or if for some other reason you believe it.

INSTRUCTION NO. 8

Plaintiff alleges that Defendants wrongfully terminated him in violation of various laws and seeks damages for his discharge.

First, Plaintiff claims that he was discharged in violation of Iowa Code §70A.29, the so-called “whistleblower statute,” because he disclosed information to public officials that he reasonably believed evidenced a violation of law or rule, mismanagement, an abuse of authority or a substantial and specific danger to public health or safety. Defendants deny that Plaintiff was discharged for disclosing such information and, instead, assert that Plaintiff was discharged for legitimate and unrelated reasons.

Second, Plaintiff claims he was wrongfully discharged in violation of public policy because his engagement in protected activity was the determining factor in Defendants’ decision to terminate his employment. Defendants deny that Plaintiff’s engagement in protected activity was the determining factor in his discharge and contend that Plaintiff was discharged for legitimate reasons unrelated to his engagement in a protected activity.

Third, Plaintiff claims that Defendant Engel fired him in violation of his federal constitutional right to free speech, because his engagement in constitutionally protected speech was a motivating factor in her decision to terminate him. Defendant Engel denies that Plaintiff’s engagement in constitutionally protected speech was a motivating factor in her decision to terminate him and contend that Plaintiff was discharged for legitimate reasons unrelated to his protected speech.

INSTRUCTION NO. 9

In order for Plaintiff to recover on his claim of whistleblower retaliation under Iowa Code § 70A.29, Plaintiff must prove all of the following propositions:

1. Plaintiff disclosed information to public officials, which he reasonably believed evidenced a violation of law or rule, mismanagement, abuse of authority or a substantial and specific danger to public health or safety;
2. Defendants discharged Plaintiff from his employment as a reprisal for disclosing the information;
3. Defendants' conduct in discharging Plaintiff was the proximate cause of damage to Plaintiff;
4. The nature and extent of the damage.

If Plaintiff has failed to prove any of the above propositions, your verdict must be for Defendants on this claim. However, if you find that Plaintiff has proved all of these propositions, then he is entitled to damages in some amount.

INSTRUCTION NO. 10

In order for Plaintiff to recover on his claim of wrongful discharge against public policy, he must prove all of the following propositions:

1. Plaintiff disclosed information to public officials, which he reasonably believed evidenced a violation of law or rule, mismanagement, abuse of authority or a substantial and specific danger to public health or safety;
2. Plaintiff's disclosure of information to public officials was the determining factor in Defendants' decision to discharge Plaintiff;
3. The wrongful discharge was a proximate cause of damage to Plaintiff;
4. The nature and extent of the damage.

If Plaintiff has failed to prove any of these propositions, Plaintiff is not entitled to damages on his claim of wrongful discharge against public policy. If Plaintiff has proved all of these propositions, Plaintiff is entitled to damages in some amount.

INSTRUCTION NO. 11

The conduct of a party is a “proximate cause” of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.

“Substantial” means the party’s conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

INSTRUCTION NO. 12

There is evidence that Plaintiff was an employee at will. An employee at will may be terminated at any time for any reason, except if it is contrary to public policy. It is against public policy to discharge an employee for making statements or sending e-mails or letters to public officials, if the employee reasonably believes the information evidences a violation of law or rule, mismanagement, an abuse of authority, or a substantial and specific danger to public health or safety.

INSTRUCTION NO. 13

A determining factor need not be the main reason behind the decision. It need only be the reason which tips the scales decisively one way or the other.

INSTRUCTION NO. 14

In order for Plaintiff to recover on his claim of First Amendment retaliation against Defendant Patricia Engel, Plaintiff must prove all of the following elements:

1. Defendant Engel discharged Plaintiff;
2. Plaintiff's statements, letters or e-mails to public officials and others were a motivating factor in Defendant Engel's decision to discharge Plaintiff;
3. Defendant Engel's conduct in discharging Plaintiff was the proximate cause of damage to Plaintiff;
4. The nature and extent of damage.

However, your verdict must be for Defendant Engel on this claim if any of the above elements has not been proved by the greater weight of the evidence, or if it has been proved by the greater weight of the evidence that Defendant Engel would have discharged Plaintiff regardless of his statements, letters or e-mails. You may find that Plaintiff's statements, letters or e-mails were a motivating factor in Defendant Engel's decision if it has been proved by the greater weight of the evidence that Defendant Engel's stated reasons for her decision are not the real reasons, but are a pretext to hide discrimination.

INSTRUCTION NO. 15

As used in these instructions, Plaintiff's statements, letters or e-mails to public officials and others were a "motivating factor" if Plaintiff's statements, letters or e-mails to public officials and others played a part in Defendant Engel's decision to discharge Plaintiff. However, Plaintiff's statements, letters or e-mails to public officials and others need not have been the only reason for Defendant Engel's decision to discharge Plaintiff.

INSTRUCTION NO. 16

If you find in favor of Plaintiff on any of his claims, then you must award Plaintiff such sum as you find by the greater weight of the evidence will fairly and justly compensate him for any actual damages you find he sustained as a direct result of Defendants' actions. You shall consider the following items of damage separately:

1. Wages and benefits Plaintiff would have earned in his employment with the City of Cedar Rapids if his employment had not ceased on November 21, 2003, through the date of your verdict, minus the amount of wages and benefits that plaintiff received from other employment during that time.
2. The present value of Plaintiff's loss of future wages and benefits, starting from the date of your verdict, which he would have earned from his employment with the City of Cedar Rapids, if his employment had not ceased, minus the amount of wages and benefits that Plaintiff can reasonably be expected to earn from other employment in the future, as if he worked until the age you determine he would have retired or left the employment of the City of Cedar Rapids.
3. Emotional distress from the date of discharge to the present.
4. Emotional distress in the future, starting from the date of your verdict.

INSTRUCTION NO. 17

If you find in favor of Plaintiff on any of his claims, but you do not find that Plaintiff's damages have monetary value, then you must return a verdict for Plaintiff in the nominal amount of One Dollar (\$1.00).

INSTRUCTION NO. 18

Plaintiff has a duty under the law to mitigate or lessen his damages. That is, Plaintiff was required to exercise reasonable diligence to locate other suitable employment after his employment with the City of Cedar Rapids ended and to maintain suitable employment once located. If you find by the greater weight of the evidence that Plaintiff failed to seek out or take advantage of an employment opportunity that was reasonably available to him, you must reduce his damages by the amount he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.

INSTRUCTION NO. 19

Future damages must be reduced to present value. “Present value” is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the party for future losses.

INSTRUCTION NO. 20

In arriving at an item of damage you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage, and agreeing in advance that the average of those estimates shall be your item of damage.

INSTRUCTION NO. 21

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes, and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 22

In conducting your deliberations and returning your verdicts, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

(CONTINUED)

INSTRUCTION NO. 22 (Cont'd.)

Fourth, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdicts should be—that is entirely for you to decide.

Fifth, I am giving you verdict forms. The verdict forms are simply the written notice of the decisions that you reach in this case. Your verdicts must be unanimous. You will take the verdict forms to the jury room, and when each of you has agreed on the verdicts, your foreperson will fill in the form, and sign and date it. The foreperson must bring the signed verdict forms to the courtroom when it is time to announce your verdicts. When you have reached your verdicts, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Finally, Members of the Jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return such verdicts as accords with the evidence and these instructions.

DATED this 30th day of June, 2006.

**LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA**